Supreme Court, U.S.
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No. 06-113

IN THE

Supreme Court of the United States

Mariamma J. Philipose,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Tenth Circuit

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QUESTIONS PRESENTED

This case arises from a counsel forced plea of a defendant suffering from a mental/emotional disability at the time of entering the plea. This petition follows a split vote by the panel of the Circuit Court which heard the case.

1. CAN A PLEA BY A PERSON SUFFERING FROM A MENTAL DEFECT, PROVEN BY UNCONTESTED COMPETENT MEDICAL EVIDENCE IN OPEN COURT, THAT THE PERSON WAS NOT COMPETENT TO UNDERSTAND THE NATURE, PURPOSES AND CONSEQUENCES OF A GUILTY PLEA, ENTER A PLEA OF GUILTY WHICH IS LEGALLY AND CONSTITUTIONALLY KNOWING AND WHICH WOULD INSPIRE CONFIDENCE IN ITS VALIDITY.

2. DOES A LAWYER, KNOWING OF HIS CLIENT'S MENTAL HEALTH TREATMENT BUT FAILING TO CONTACT THE MENTAL HEALTH CARE PROVIDER TO INVESTIGATE AND DETERMINE THE EXTENT OF THE MENTAL DEFICIENCY, FAIL TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED BY THE SIXTH AMENDMENT OF THE CONSTITUTION.

3. DOES A LAWYER WHO HAS KNOWLEDGE OF HIS CLIENT'S MENTAL HEALTH TREATMENT BUT FAILS TO INVESTIGATE THE EXTENT OF THE ILLNESS WHICH WOULD HAVE REVEALED TO HIM THAT THE CLIENT WAS NOT COMPETENT TO UNDERSTAND THE NATURE, PURPOSES AND CONSEQUENCES OF A GUILTY PLEA, AND HAS PRESENTED EVIDENCE TO THE GOVERNMENT OF HIS CLIENT'S FACTUAL INNOCENCE FAILED TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL BY URGING A PLEA OF

GUILTY TO THE CLIENT.

4. DOES A COURT COMMIT ERROR WHEN IT PERMITS THE LAWYER'S LAY OPINION OF THE COMPETENCE OF THE CLIENT TO SUPPLANT THE PROFESSIONAL MEDICAL OPINIONS TO THE CONTRARY, IN DETERMINING WHETHER THE CLIENT WAS ABLE TO UNDERSTAND THE NATURE, PURPOSES AND CONSEQUENCES OF ENTERING A PLEA OF GUILTY.

PARTIES TO PROCEEDING

The caption accurately reflects the parties to these proceedings. Mariamma Philipose was the defendant below, appellant in the Circuit Court and is the Petitioner herein.

The United States is the only other party hereto and has been since the return of the Indictment against the Petitioner.

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BASIS FOR JURISDICTION IN THE SUPREME COURT

This Petition seeks the review of a judgment of a United States court of appeals, the basis for jurisdiction of the court of first instance, though not expressly stated in the original charging document, is predicated on Title 18 United States Code, §3231, which provides the United States District Courts, generally, and, therefore, the United States District Court for the Western District of Oklahoma, specifically herein, possess original jurisdiction over offenses against the laws of the United States which occur within the geographic boundaries of that district. The United States Court of Appeals for the Tenth Circuit stated that it exercised jurisdiction pursuant to 28 United States Code, §1291. In the instant cause the jurisdiction was invoked pursuant to the provisions of 28 United States Code, §2255 which permits the courts of the United States to vacate, set aside or correct a sentence which is subject to collateral attack. Section 1291 sets forth the appellate court's statutory authority to review the final orders of a United States district court.

Review in this Court from the decisions of the lower federal courts is discretionary and based on considerations of compelling importance and departure of the circuit court from the decisions of other circuit courts on the same issues or the departure of the circuit court from the usual course of judicial proceedings or has sanctioned such a departure by a United States district court. In such instances this Court is called on to exercise its superintending powers. Such discretionary jurisdiction is properly exercised in cases involving serious Constitutional procedural and representational issues. The statutory basis for this jurisdiction is 28 United States Code, §1254(1). The decision of the circuit court was rendered on December 22, 2005. A timely motion for re-hearing en banc was filed and this was denied on February 22, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner informs this Court that there are three primary Constitutional provisions involved in this cause. First, is the Sixth Amendment issue of the effective assistance of counsel in the representation of this Petitioner at the district court.

The Second Constitutional issue is the Due Process Clause of the Fifth Amendment to the extent that while she received procedural Due Process Petitioner did not receive substantive Due Process.

Thirdly, the Petitioner states that it is a violation of the Eighth Amendment to punish an individual who was not competent at the time of entering a plea of guilty to understand the nature, purposes and consequences of that act.

STATEMENT OF THE CASE

This case *a priori* involves the duty of counsel in the representation of his client to make certain reasonable investigations. The relevant factual background reveals that this case arose out of an allegation that the Petitioner was receiving Federal Worker Compensation Benefits at the same time she was working for another employer. The Petitioner had been permanently injured while working at the Veteran's Administration Hospital in Oklahoma City, Oklahoma. For the following twenty plus years she received medical treatment for intractable debilitating pain and was paid worker compensation for this injury.

An investigator of the Office of the Inspector General of the U.S. Department of Labor went to a location where she observed the Petitioner on several occasions to be present for long periods of time. The investigator then sought through the Office of the United States Attorney an Indictment for violation of the prohibition against working while receiving the federal

benefits.

The Petitioner retained the services of Oklahoma City lawyer Mark Blasdel to defend against these charges. Blasdel obtained information that the injuries to the Petitioner were verified and that she was, in his opinion based on the evidence, not guilty of the charges.

Blasdel entered into discussions with the assigned Assistant United States Attorney (AUSA) regarding the filing of charges and the resolution of the allegations. These discussion lasted over an extended period of time, the exact length of which is unclear.

While these discussions were being conducted the Petitioner continued to be treated by two doctors relevant to this Petition. Drs. Wade McCoy was treating the Petitioner for the physical aspect of her injury. However, he had determined that Mrs. Philipose, the Petitioner herein, had become mentally unstable due to the length and severity of her intractable pain. As a result of this diagnosis he referred her to Dr. Gene Hawkins for treatment of the psychological aspect of her injury. Both doctors testified for the Petitioner at the time of the hearing on her §2255 application in the federal district court. There testimony was that she was suicidal and they feared for her life. Dr. McCoy testified that he recommended that she go to the store owned by her family as a method of preventing her from being alone and acting on her suicidal desires. Dr. Hawkins testified that the Petitioner was suffering from a form of Post Traumatic Stress Syndrome and that he likewise had determined that she was extremely self-destructive. His treatment of this Petitioner began approximately two months prior to her plea in the district court.

Both doctors, McCoy being her primary care physician and Hawkins treating her psychological illness, testified that they were never contacted by the Petitioner's attorney, Mark Blasdel. Both also stated that at the time of the plea they were actively engaged in trying to keep the Petitioner alive and treat

her medical conditions. Neither was aware of the pendency of any plea in the district court. Additionally both testified that in their medical opinions at the time of the entry of the plea the Petitioner was not competent to understand the nature, purpose or consequences of her act.

The documents required for the plea in the district court, which were filled out by Blasdel, for the Petitioner, clearly contains the name of Dr. Hawkins as a treating doctor. The document also demonstrates that the Petitioner was seeing him for psychological reasons. Nonetheless, Blasdel never inquired as to the nature, circumstances nor opinion of Dr. Hawkins as to the mental condition of the Petitioner.

Blasdel, testifying at the §2255 hearing in district court, in defense of his representation of the Petitioner stated that he never observed anything unusual in the Petitioner and that on occasion he observed her to be somewhat physically uncomfortable. He also stated that at some point in the discussions with the AUSA they determined it was time to enter a plea. Blasdel admitted that this was an *ex parte* decision not made in consultation with the Petitioner. Blasdel tacitly admitted that the case had grown old and he was ready to get rid of it. Blasdel had no explanation of the fact that all of the evidence he presented to the AUSA supported the innocence of his client but he persisted in getting her to enter a plea of guilty.

The district court, a judge of venerable federal judicial experience determined that:

> The evidence does not support defendant's claim that Mr. Blasdel should have contacted Dr. McCoy and Dr. Hawkins prior to discussing the plea agreement with defendant. There is no evidence that defendant, her husband, or her son suggested that her pain level affected her ability to think rationally or her competency to make decisions. Although both doctors knew about the federal charges, neither suggested to

> defendant or her family that she was not competent to proceed; neither contacted her attorney or anyone else to suggest reservations about her ability to make decisions.

The district court then determined, accepting Blasdel's account exclusively, that there was no ineffective assistance of counsel on the part of Blasdel denied the Petitoner's application for relief pursuant to §2255.

The Petitioner then filed an appeal to the Circuit Court of Appeals for the Tenth Circuit. The circuit court granted a Certificate of Appealability as to whether Blasdel rendered ineffective assistance by failing to consult with Philipose's doctors regarding her competency and whether Blasdel rendered ineffective assistance by pressuring Philipose to plead guilty even if overwhelming evidence demonstrated that she was not guilty?

In determining the issues in this appeal the Circuit Court relied heavily on the findings of the district court. These findings, however, were to be reviewed for clear error and the legal determinations on a *de novo* standard. The Circuit Court found that the burden of raising the competency rested with others, not with the Petitioner's counsel. The unrefuted medical testimony was insufficient to raise any question regarding the competency of the Petitioner at the time of the entry of the plea worthy of appellate review.

The Circuit Court determined that the risk of conviction at jury trial was sufficient to overcome the evidence amassed indicating the innocence of the Petitioner and justified the entry into plea negotiations with the AUSA. The opinion of the Circuit Court was not, however, unanimous. Judge Holloway wrote a lengthy and well reasoned dissent.

The Circuit Court found that Blasdel's representation had not been below an objective standard of reasonableness and

that the Petitioner had not, therefore, received ineffective assistance of counsel.

From the denial of relief in the Circuit Court the Petitioner has filed this Petition for Writ of Certiorari in this Court.

REASONS FOR GRANTING THE WRIT

1. On the frieze above the entry to this Court are inscribed the words "Equal Justice Under Law". That pronouncement is both the spirit and the substance of the claims made by this Petitioner to this Court. A plea by a person suffering from a mental defect, proven by uncontested competent medical evidence in open court, that the person was not competent to understand the nature, purposes and consequences of a guilty plea, cannot enter a plea of guilty which is legally and Constitutionally knowing and which would inspire confidence in its validity.

This Court stated in *Godinez v. Moran*, 509 U.S. 389, 400, 401 (1993),

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. Parke v. Raley, 506 U.S. 20, 28 -29 (1992) (guilty plea); Faretta, supra, at 835 (waiver of counsel). In this sense, there is a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

This Court has, thus, held that the competency standard for waiving a jury trial and entering a plea of guilty is the same as that for being tried by a jury. Therefore, when the competency of one to enter a plea of guilt is raised it is necessary to determine the basis and validity of that claim. In the instant cause that burden was borne by the Petitioner in the form of uncontested and un-refuted medical testimony.

The testimony was not merely conjectural as to the ability to enter a plea of guilty. It was based on another venerable case of this Court. In *Drope v. Missouri*, 420 U.S.162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"). In this case the basis for the medical testimony was whether this Petitioner could rationally understand the nature, purposes and consequences of her actions in entering a plea of guilty to the charges. Both medical witnesses stated that she was not of such a mind. The Government offered no medical witnesses to refute the assertion that at the time of the entry of her plea that she was not competent to do so.

The Petitioner has made a *prima facie* showing that at the time of her entry of her plea of guilty the medical evidence was sufficient to demonstrate her lack of competence to do so.

2. A lawyer, knowing of his client's mental health treatment but fails to contact the mental health care provider to investigate and determine the extent of the mental deficiency, fails to render effective assistance of counsel as required by the Sixth Amendment of the Constitution. It is unclear from the record exactly when Petitioner's district court counsel learned of the mental health treatment of Petitioner. However, it is clear from the change of plea forms which he filled out for the Petitioner that he certainly knew on that date; as he placed Dr. Hawkins name on the form.

The duty to investigate is a critical duty of defense

counsel in a criminal case. In the recent decision in *Rompilla v. Beard,* ____ U.S.___, 125 S.Ct. 2456 (2005) this Court determined that defense counsel was deficient for failing to conduct an independent investigation for mitigation evidence in a capital case. This Court rejected a rationale in *Rompilla* which is analogous to the one employed by both the district and circuit courts in this case. Both lower courts, herein, placed a burden on family members or other to come forward and raise issues with the defense counsel. In regard to the medical providers this places a burden on them completely outside the realm of their profession. Without any basis, this places on these doctors the duty to monitor the status of legal proceedings of which they may not even be aware and to *sua sponte* raise issues with counsel. The lower courts, herein, also placed a burden on the family members of the Petitioner to raise issues of competence with the lawyer. This burden likewise assumes certain knowledge and expertise which is unsupported by the record.

It appears that the district and circuit courts have placed a burden on everyone to protect the rights of this Petitioner except her counsel. Once district court counsel had knowledge that his client was receiving treatment for a psychologic problem he had a duty to investigate the issue. Had he done so the fact that his client was suicidal and self-destructive to the point that she was not capable of making rational decisions would have been known to him. Surely, such information would have to have an affect on the lawyer's advocacy of the entry of a plea of guilty.

This investigation would have changed the answers which this lawyer placed on the change of plea form relative to the competence of his client and **whether he knew of any reason** to question the competency of his client to enter the plea of guilty.

Indeed, this is no less than would be expected of a

reasonably competent defense counsel in a criminal case. When this matter was presented to current counsel, the fact of the treatment immediately raised questions as to the competency of this Petitioner. Those questions led to the investigation which, in turn, led to the discovery of the medical opinions challenging her competency at the time to enter the plea.. Those discoveries resulted in the filing of the instant cause in the district court for relief. Had Blasdel taken the time to investigate, even as late as the day of the change of plea, to confirm the competency of his client we would not be here today.

3. A lawyer having a reasonable belief of and having presented evidence to the Government of his client's factual innocence fails to render effective assistance of counsel by urging a plea of guilty to the client.

In *Strickland v. Washington*, 466 U.S. 668 (1984) this Court held, that the Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. This Court stated that the proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty

to investigate, the duty at issue in this case. Pp. 687-691.

With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 691-696.

Herein, the Circuit and District Court rulings notwithstanding, the Petitioner has shown that the actions of her lawyer in the original cause were unreasonable. There can be no doubt that the failure on the part of district court counsel qualifies as assistance.

It is equally clear that but for these unprofessional errors there is a reasonable probability the result would have been different.

As noted above the district court lawyer testified that he determined it was time to enter a plea and approached the AUSA regarding accomplishing this task. At this point counsel was looking to terminate the case. The Circuit Court stated that this was proper due to the "risk" of a jury trial. Such a risk is inherent in the adversarial system. All innocent defendants are at risk in a jury trial. There is no method of eliminating this risk. Certainly entering a plea does not vitiate the risk. Entering a plea of guilty merely relieves the burden on the prosecution to prove its case, only their risk is eliminated.

In *United States v. Cronic*, 466 U.S. 648, 656-657 (1984), this Court stated,

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the

> prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

It is asserted that counsel in this case abandoned his role as advocate for the client. The rationale offered by the lower Courts do not create a reasonable explanation for his conduct. Indeed, the Circuit Court decision notes that there was apparently considerable evidence which refuted the contentions of the prosecution. It is noteworthy that the Circuit Court stated, "When it became apparent that the government would go forward with the prosecution on four felony counts, Blasdel negotiated a plea to a one count misdemeanor charge." (Slip Op. December 22, 2005, p. 13). This sort of charge deflation clearly demonstrates the strength of the defense to these charges. Rather than looking for a way out, counsel should have been forging ahead. But he had determined that it was time to enter a plea. Where is the adversarial process when counsel can see a probable victory and "throws in the towel". Moreover, had Blasdel interviewed Dr. McCoy prior to this plea he would have discovered that he was the reason this Petitioner was at the store. The Circuit Court acknowledges (Holloway, dissenting, page 4) that this doctor was the person who advised this Petitioner to go to the store due to his concerns of her suicidal ideation.

Had Blasdel investigated this matter fully he would have obtained all of the information necessary to demonstrate the lack of any fraudulent intent on the part of his client. He, however, chose to abandon his duty to represent his client solely

because the Government declined his request to dispense with the prosecution. Therein lies no advocacy and without such advocacy there is no effective representation of counsel.

The Petitioner has clearly demonstrated to this Court that she has met the two prongs of *Strickland.* The representation fell below an objectively reasonable standard and as a result she suffered a detriment in the form of a wrongful criminal conviction and sentencing thereon.

4. A court commits error when it permits the lawyer's lay opinion of the competence of the client to supplant the professional medical opinions to the contrary, in determining whether the client was able to understand the nature, purposes and consequences of entering a plea of guilty. This is a situation which is substantively different from the Court weighing the credibility of witnesses or merely determining facts. This is no battle of the experts. This Court many years ago in *Daubert v. Merrill Dow,* 509 U.S. 579 (1993) explained the admissibility of expert testimony in accordance with *Federal Rules of Evidence, Rule* 702. This Rule permits the testimony of witnesses with specialized knowledge if it will assist the trier of fact. Witnesses McCoy and Hawkins by training, education and experience fulfill the three requirements of the Rule.

Their testimony was based upon sufficient information by having treated this Petitioner for an extended period of time in a medical setting. The testimony was the product of reliable principles and methods approved by their respective professions. The principles and methods were applied to the facts of this case. It is important to note that these witnesses were not retained for the purpose of any litigation but were, in fact, the treating doctors for this Petitioner.

Further the testimony of each was consistent with the testimony of the other as to the nature of the condition of this Petitioner. The condition was one which had been diagnosed

prior to the commencement of this prosecution. These witnesses were, therefore, untainted by any external factor in arriving at their professional opinions.

In opposition to these objective considered opinions the Government offered Mark Blasdel. Blasdel the prior district court lawyer who failed to talk to these doctors. Whose own conduct was under scrutiny by the court and whose testimony reflected the self-serving nature of his dilemma. Blasdel testified that he observed no lack of competency. Blasdel did not testify as to any training, education or experience which would enable him to render such a conclusion. Blasdel did not meet any of the criteria set forth in *Rule* 702 which would give him the ability to claim any expertise in this field.

The district court tacitly accepted his account of the condition of this Petitioner. However, the district court did not make any specific ruling on the competency of the Petitioner and only found that Blasdel had not rendered ineffective assistance of counsel.

The circuit court, likewise, avoided the issue. In granting the Certificate of Appealability it did not choose to review the competency question requested. Judge Holloway noted this fact in footnote 1 to his eloquent dissent, (Slip Op. dissent, page 1):

> Although this court has not granted a Certificate of Appealability (COA)on the issue of whether Defendant's plea was invalid because she was incompetent, Defendant's competency is directly relevant to the issue on which we have granted a COA: whether she received ineffective assistance of counsel. This is because even if counsel's performance fell below an objective standard of reasonableness, Defendant would not be prejudiced unless she indeed lacked competency at the time she entered into the plea.

By choosing to not confront the competency issue directly the lower courts have been able to excuse the conduct of Blasdel and find that he was effective in his assistance of the Petitioner.

The lower courts, without ruling on the competency question, shift the burden of to the Petitioner and others to have raised the issue at the time of the plea. Such a position by those courts misses the crux of the issue. This could only have been done through her then counsel Blasdel. The same person who demonstrated a remarkably indifferent attitude to the Petitioner being treated for a mental condition. The person who had a vested interest in subsequently testifying that he had no reason to question the Petitioner's competency.

The opinion of the district court and the majority opinion of the circuit court are clearly erroneous. It is incumbent on this Court that it exercise its lawful powers and authority to correct the egregious result which has manifested itself in this case.

CONCLUSION

The Petitioner has demonstrated the clear violation of her rights to effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. She has demonstrated that the diverse factual determinations made by the district court and affirmed by the circuit court are clearly erroneous and warrant the intervention of this august body. Therefore, for the foregoing reasons the Petitioner respectfully states that her Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

No. 04-6240
(D.C. No. CR-02-124-T)
(D. Okla.)

MARIAMMA J. PHILIPOSE,
Defendant-Appellant.

ORDER AND JUDGMENT[*]

Before **HENRY**, **HOLLOWAY**, and **LUCERO**, Circuit Judges.

Mariamma Philipose appeals the district court's denial of her § 2255 habeas petition. She argues that she was denied effective assistance of counsel in connection with her decision to plead guilty to making a false statement to obtain federal employee's compensation. Because her counsel's performance did not fall below an objective standard of reasonableness, we **AFFIRM** the district court's decision denying Philipose habeas relief.

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[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an orderand judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

I

Philipose severely injured her back while working as a nurse at the V.A. Hospital. On July 6, 1980, Philipose attempted to lift a patient out of bed when she lost her balance and struck her back against a wall heater. Increasing pain and a failed back surgery forced her to work only sporadically until 1984, when Philipose's doctors determined that she was no longer able to work at all. Philipose subsequently endured three more failed surgeries, after which her primary treating physician determined that she "could not stand, walk, or sit, without some change in position, for more than 20 to 30 minutes at a time," and that Philipose "could not lift, bend or stoop." As a result of her total disability stemming from a personal injury incurred while performing duties as a federal employee, Philipose collected compensation from the United States government.

Dr. Wade McCoy, a family practitioner, began treating Philipose for her constant pain. He became increasingly concerned with Philipose's mental health, as Philipose reported

suffering from suicidal ideation. In response, Dr. McCoy recommended that Philipose "try to be with family as much as possible . . . that she be in the store, that she owns a retail shop in Bethany, if possible, that she go to the store and, at least for part of the day, be there in the store . . . ." Philipose and her husband owned two stores located on the same street and, in response to Dr. McCoy's recommendation, Philipose began spending time in these establishments.

Suspecting that Philipose was performing some duties at her family's stores, the FBI and the U.S. Department of Labor Office of Inspector General launched an undercover operation in March 1998. The record reveals that on July 7, 1998, an undercover law enforcement officer purchased a pair of "scrub pants" from Philipose, that a series of undercover agents posed as customers over a one-year period, and that Philipose "had helped several agents who had come to the store."

On May 4, 1999, Philipose filled out Form 1032. By completing and sending this form to the Department of Labor

("DOL"), benefits recipients comply with federal regulations requiring them to disclose to the DOL any employment compensation they have received. Philipose truthfully reported that she had not received any compensation. Form 1032 also requires disclosure of any employment, self-employment, volunteer work, and any involvement in a business enterprise for the preceding fifteen months. Philipose indicated on Form 1032 that she had not performed any work over the covered period of time.

In January 2000, four federal agents appeared at one of Philipose's stores. Two agents took Philipose aside for questioning and the other two agents began questioning a store employee. According to the employee's affidavit, she felt "very threatened" by the agents' questioning. For example, after the employee stated that Philipose's husband, and not Philipose, managed the store's accounts and deposited money in the bank, the agents allegedly said: "You had better be careful because Mary is in serious trouble and you don't want to get into serious

trouble by lying" and "we have been watching her for a long time and today we watched her walk between the uniform store and the clothing store." The employee acknowledged that on occasion, Philipose "rang up a sale or sacked clothes." In response to questioning by the other two agents, Philipose admitted that she occasionally completed sales at a cash register, drove from the store to her house, and made bank deposits for the stores.

Aware that she was the subject of a serious federal criminal investigation, Philipose retained Mark Blasdel as counsel. Blasdel had extensive experience as a state prosecutor and criminal defense attorney. He met numerous times with Philipose and extensively reviewed her medical history and the facts surrounding her activities at the stores. Blasdel interviewed Philipose's husband and store employees. After securing affidavits from the employees, he submitted them to the U.S. Attorney's Office in advance of several meetings that he had with prosecutors to discuss the investigation. He also

provided prosecutors with Philipose's medical records and letters from physicians, and on one occasion brought one of Philipose's treating physicians with him to meet with prosecutors. Blasdel presented a compelling case to the U.S. Attorney's Office that Philipose was functionally incapable of working at her family's stores.

Despite Blasdel's efforts, prosecutors informed him that they were contemplating filing four felony charges against Philipose. Blasdel entered plea negotiations and secured an offer from the government that would allow Philipose to plead guilty to a single misdemeanor charge – making a false statement to obtain federal employee's compensation. 18 U.S.C. § 1920. After receiving the government's offer, Blasdel met for several hours on numerous occasions with Philipose, her husband, and her son (a chiropractor) to discuss the possibility of pleading guilty. They discussed the facts of the case, possible defenses, the risk of trial, and the benefits and detriments of pleading guilty to the misdemeanor. As a result of these

conversations, Philipose decided to accept the plea offer.

With the assistance of Blasdel, Philipose completed a Petition to Enter a Plea of Guilty. On this form, Philipose answered that she has "been under the care of a doctor or under treatment for a mental or emotional condition," and elaborated that she was being treated for "pain management." She represented that she had enough time to speak with Blasdel about her case and that she was satisfied with his representation. She indicated an understanding of the rights that she was waiving by pleading guilty and of the sentence exposure that she faced. In her own words, she stated that she "did the act charged," specifically representing: "I made a statement on the Federal Workers Compensation form that I was not working when I was."

During the plea colloquy before the district court, Philipose stated that she had consulted with Blasdel to her satisfaction about the consequences of pleading guilty. She indicated an understanding of her right to a jury trial and a right

to indictment and waived those rights. After approving the waiver of her jury trial and indictment rights, the court began to question her about the factual basis for her plea. Philipose affirmed that the statements on her Petition to Enter a Plea of Guilty were her own words. To further satisfy itself that there was a factual basis for the plea, the court asked the prosecution to question Philipose under oath. In response to the prosecution's inquiries, Philipose affirmed that she had denied on Form 1032 having worked in the preceding fifteen months, that she was in fact "doing work in that 15 month period," that her "answer was false on the form," that she "knew that it wasn't true and . . . signed it knowing it wasn't true," and that she did so knowingly and willfully. The court accepted her guilty plea. At sentencing, Blasdel spoke effectively on Philipose's behalf and requested that the court impose the most lenient sentence available. The court agreed and sentenced Philipose to a two-year term of probation and ordered her to make restitution to the government.

Although Philipose did not directly appeal her sentence, she retained new counsel and timely filed a 28 U.S.C. § 2255 petition to vacate, modify, or set aside her sentence, arguing that she received ineffective assistance of counsel in connection with the entry of her plea. The government sought summary dismissal of the petition, arguing that the plea agreement into which Philipose entered contains an express waiver of the right to appeal or to collaterally attack the plea. The plea agreement specifically provides: "defendant in exchange for the promises and concessions made by the United States in this plea agreement, knowingly and voluntarily waives her right to appeal or collaterally challenge Defendant's guilty plea and any other aspect of her conviction, including but not limited to any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues." Because Philipose attacked her plea on the basis of ineffective assistance of counsel, the court denied the government's motion relying on our ruling that "a plea agreement waiver of postconviction rights does not

waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver." United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001).

The court proceeded to consider Philipose's claim that she was denied effective assistance of counsel. At a hearing on the matter, Philipose presented testimony from Dr. McCoy and from Gene Hawkins, a psychologist and pain management specialist who treated her at the time of her plea. Dr. McCoy testified that he had no contact with Blasdel during the time that he represented Philipose. He further stated that at the time Philipose entered her plea, "her ability to make a rational decision and understand the consequences of that decision were greatly impaired." Hawkins testified that McCoy referred Philipose to him for treatment in February 2002, three months before Philipose agreed to plead guilty. He diagnosed her as suffering from posttraumatic stress disorder, a condition which left her with "an indifference about life and what's going to

happen to [her]." In response to the question, "would you treat with some suspicion or skepticism her having entered a knowing, voluntary, and rational decision to enter a plea in this case," Hawkins answered, "I would."

Blasdel testified about the course of his representation of Philipose. He stated that he had no problem communicating with her and although she often was in pain during their meetings, "she wasn't totally preoccupied with her pain." In his view, Philipose understood the risks of proceeding to trial and the costs and benefits of pleading guilty. During their conversations "she was on little, if any, medication, maybe minimal medication." Although Philipose informed Blasdel that she was being treated by a psychologist for pain management, Blasdel never perceived her level of pain as rendering her incompetent. He emphasized several times in his testimony that he never suspected that she was incompetent to proceed with a guilty plea.

On consideration of the evidence, the district court

denied Philipose's § 2255 petition. The court found that Blasdel diligently investigated Philipose's defense and "consistently offered effective assistance." Moreover, given that neither Philipose, her husband, nor her son ever "suggested that her pain level affected her ability to think rationally or her competency to make decisions," that neither Dr. McCoy nor Hawkins "raised any question or concern on her behalf" despite their knowledge that she was facing federal criminal charges, and that Blasdel consistently considered Philipose's communication and demeanor as consistent with competence, the court found that "[t]he evidence does not support defendant's claim that Mr. Blasdel should have contacted Dr. McCoy and Dr. Hawkins prior to discussing the plea agreement with the defendant." Based on these findings, the court ruled that Blasdel provided Philipose with effective assistance. Having rejected Philipose's ineffective assistance of counsel claim, the court did not rule on whether Philipose was incompetent to enter a plea of guilty.

The district court denied Philipose's application for a certificate of appealability ("COA"), concluding that "her claim of ineffective assistance of counsel does not satisfy the standards and requirements of Strickland v. Washington, 466 U.S. 668 (1984); reasonable jurists could not debate that conclusion." Her application for a COA having been denied below, Philipose sought a COA from this court. We granted a COA "on the two issues . . . pertaining to ineffective assistance of counsel," namely whether Philipose "was denied effective assistance of trial counsel in connection with the plea agreement both because counsel failed to consult her doctors regarding her competency and because the evidence in the case overwhelmingly demonstrated that she was not guilty." These are the sole issues before us: (1) did Blasdel render ineffective assistance by failing to consult with Philipose's doctors regarding her competency and (2) did Blasdel render ineffective assistance by pressuring Philipose to plead guilty even if overwhelming evidence demonstrated that she was not

guilty?[1]

II

On appeal of the denial of habeas relief, this court reviews factual findings for clear error and legal determinations de novo. Romero v. Tansy, 46 F.3d 1024, 1028 (10th Cir. 1995). To prevail on her ineffective assistance of counsel claim, Philipose must prove that Blasdel's representation fell below an objective standard of reasonableness and that his deficient representation prejudiced her defense. Strickland v. Washington, 446 U.S. 668, 687-88 (1984). "There is a strong

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[1]Philipose's petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"); as a result, AEDPA's provisions apply to this case. See Rogers v. Gibson, 173 F.3d 1278,1282 n.1 (10th Cir. 1999) (citing Lindh v. Murphy, 521 U.S. 320 (1997)). AEDPA conditions a petitioner's right to appeal a denial of habeas relief under § 2255 upon a grant of a COA. 28 U.S.C. § 2253(c)(1)(B). Although Philipose seeks to argue on appeal that her plea was invalid because she was incompetent to enter a plea of guilty, we have not granted a COA on that issue.

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Romano v. Gibson, 278 F.3d 1145, 1151 (10th Cir. 2002) (quotation omitted). Philipose argues that Blasdel rendered ineffective assistance in two ways: by failing to contact her doctors to inquire into her mental state and by pressuring her to plead guilty in order to "dump the case." After careful review of the record, we have determined that Blasdel's representation did not fall below an objective standard of reasonableness.

Because Phillipose indicated on her Petition to Enter a Plea of Guilty that she has "been under the care of a doctor or under treatment for a mental or emotional condition," and elaborated that she was being treated for "pain management," she argues that it constituted ineffective assistance for Blasdel not to contact her psychologist to inquire into her competency

to plead guilty. We disagree.[2] Blasdel encountered a client who was well educated and demonstrated no difficulty in communicating with him about the case or the decision to plead guilty. He met with her, her husband, and her son numerous times and clearly explained the process of entering a guilty plea and the details of the plea agreement. At no point did anyone, including Philipose's doctors or her chiropractor son, express to Blasdel a concern over Philipose's competence. Philipose herself supplied the answers in the petition and indicated on several occasions that she understood the implications of pleading guilty and desired to do so. Philipose was on little or no pain medication during her meetings with Blasdel, and although Blasdel perceived that she was in pain, the pain never

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[2]Philipose cites to McLuckie v. Abbott, 337 F.3d 1193, 1199 (10th Cir. 2003), for the proposition that "[w]here a lawyer has actual or constructive knowledge of the mental state of his client, he has a duty to investigate." Appellant's Br. at 11. McLuckie does not stand for such a broad proposition. Rather, McLuckie held that counsel rendered ineffective assistance in a first degree murder case by failing to investigate and present a mental health defense to the crime charged where there was significant evidence that the defendant lacked the requisite mens rea. McLuckie's holding is irrelevant to the question presented in this case.

seemed to distract her from their conversation. Given this context, the mere fact that Philipose informed Blasdel that she was being treated for pain management did not impose on him a duty to seek an expert opinion as to her competence to plead guilty.[3]

Philipose also argues that Blasdel "had become tired of

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[3]The record contains no evidence that at the time she pled guilty, Philipose exhibited signs of legal incompetence such that Blasdel should have suspected that his client lacked sufficient competency. "[T]he test of mental competency at the time of trial or the entering of a plea in a criminal case is whether the accused 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.'" Fields v. Gibson, 277 F.3d 1203, 1215 n.7 (10th Cir. 2002) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). "The presence of some degree of mental disorder in the defendant does not necessarily mean that he is incompetent to knowingly and voluntarily enter a plea . . . ." Miles v. Dorsey, 61 F.3d 1459, 1472 (10th Cir. 1995) (quotation omitted). Although Dr. McCoy testified that at the time Philipose entered her plea, "her ability to make a rational decision and understand the consequences of that decision were greatly impaired" and Hawkins agreed with the statement that he would "treat with some suspicion or skepticism her having entered a knowing, voluntary, and rational decision to enter a plea in this case," this testimony does not demonstrate that Philipose lacked the ability to consult with Blasdel with a reasonable degree of rational understanding or that she lacked a rational understanding of the proceedings against her. See, e.g., Dorsey, 61 F.3d at 1474 ("Petitioner's history of mental problems, low intelligence, psychotropic medication, and substance abuse do not establish that he was incompetent to plea.").

the case or had an aversion to committing himself to the total representation of this person's interests and was looking to 'dump the case.'" Appellant's Br. at 13. She asserts that Blasdel possibly recognized "the psychologic problems of his client and chose to simply ignore them" because "if he discovered that she was not able to enter a plea then his 'dump the case' plan would have been derailed." Id. In sum, she argues that Blasdel was not committed to representing Philipose and pressured her to plead guilty to terminate the representation.

The record, however, paints a very different picture. Blasdel conducted a thorough investigation of the case, including meeting with Philipose, her family, and store employees. Following extensive interviews with store employees, he secured affidavits from them that he submitted to the government. He combed through Philipose's voluminous medical records and presented compelling evidence to the government that Philipose was incapable of working. To supplement this evidence, he brought one of her treating

physicians with him during one of his many meetings with the U.S. Attorney's Office. When it became apparent that the government would go forward with the prosecution on four felony counts, Blasdel negotiated a plea to a one count misdemeanor charge. Although Blasdel had amassed significant evidence to defend his client at trial, there was a real possibility that Philipose would be convicted based on the evidence yielded by the government's undercover operation and its interviews with Philipose and store employees. Under the circumstances, it was not unreasonable for Blasdel to explore a plea agreement with his client. See Strickland, 466 U.S. at 689 ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

He met extensively with Philipose and her family to discuss the plea agreement, and Philipose repeatedly stated under oath – both in written form and orally – that she understood the implications of pleading guilty, that she

committed the crime charged, and that she was satisfied with Blasdel's representation of her. At sentencing Blasdel gave an impassioned defense of his client and helped secure a sentence of probation. The record clearly demonstrates that Blasdel's representation did not fall below an objective standard of reasonableness. Id. at 687.

In reaching this conclusion, we do not implicate the government's decision to target Philipose for investigation or its decision to prosecute her. We merely hold that in not gambling with a four count felony indictment, and in obtaining for his client an agreement from the government to accept a plea to a single misdemeanor charge and no incarceration, Philipose's attorney did not render ineffective assistance.

III

Because Philipose has failed to show that Blasdel's representation fell below an objective standard of reasonableness, we conclude that she did not receive ineffective assistance of counsel in connection with her plea of guilty. We

AFFIRM the decision of the court below denying Philipose's § 2255 motion and **DISMISS** this appeal.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. The Order and Judgment of the majority thoroughly discusses the evidence and authorities pertaining to the ruling on appeal, the denial of Defendant Philipose's motion under 28 U.S.C. § 2255 to set aside her plea and sentence. The basic issue raised by this appeal from that ruling is whether the Defendant was denied the constitutionally guaranteed effective assistance of counsel. I must disagree with the majority's conclusion that Defendant received effective assistance of counsel.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the Defendant."[1] *North Carolina v. Alford*, 400 U.S. 25, 31

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[1]Although this court has not granted a Certificate of Appealability (COA) on the issue of whether Defendant's plea was invalid because she was incompetent, Defendant's competency is directly relevant to the issue on which we have granted a COA: whether she received ineffective assistance of counsel. This is because even if counsel's

(1970); see *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The Defendant asserts that her guilty plea was not a voluntary and intelligent choice because she lacked the competency to make the rational decision necessary to enter into the plea. Defendant's counsel failed to investigate her mental health status despite his knowledge of seriously disturbing circumstances about Defendant's mental health. I am convinced that Defendant demonstrates that she received ineffective assistance of counsel due to counsel's failure to properly investigate her mental status before conferring with her as to the advisability of entering a guilty plea.

It is uncontroverted that Defendant's then counsel, Mr. Blasdel, knew that Defendant was under the care of a psychologist at the time Defendant entered into the plea

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performance fell below an objective standard of reasonableness, Defendant would not be prejudiced unless she indeed lacked competency at the time she entered into the plea.

agreement. Defendant's psychologist, Doctor Hawkins's, name was written in the change of plea petition. *See* Transcript of April 29, 2004 proceedings at 51. In response to Question 5 in the form which asks "Have you ever been under the care of a doctor or under treatment for a mental or emotional condition?," the answer "yes" was marked. *Id.* Counsel also knew that Defendant had been under the care of Doctor McCoy, Defendant's then treating general physician. Counsel admitted on cross examination that he was aware of the existence of Doctor McCoy and a document from the Oklahoma Diagnostic Imaging Company, which was reviewed by counsel, shows Doctor McCoy's name as the referring physician. *Id.* at 58. Doctor McCoy had referred Defendant to Doctor Hawkins because of concern about Defendant's suicidal tendencies. Despite his knowledge that Defendant was being treated by Doctors McCoy and Hawkins, counsel did not make any effort to contact these health care professionals or to receive any medical information from them.

In representing Defendant in the underlying case, counsel contacted and reviewed medical evidence from some of Defendant's physicians.[2] However, he did not contact or review medical evidence from Doctors McCoy and Hawkins. We, therefore, must decide whether it was reasonable for counsel to fail to contact these health care professionals before conferring with the Defendant on the advisability of entering a plea of guilty.

As the majority notes, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Romano v. Gibson*, 278 F.3d 1145, 1151 (10th Cir. 2002). However, the presumption is not an absolute bar to a finding of ineffective assistance of counsel. A Defendant can sustain a claim of ineffective assistance of

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[2]The record shows that counsel reviewed medical evidence from Doctors Brent Tipton and Nathan Bradley who apparently at different times had treated Defendant. *Id.* at 43. Counsel also reviewed medical evidence from Doctor Jeff Pardee, the federal workers compensation doctor that reviewed Ms. Philipose's condition. *Id.*

counsel if she is able to prove: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient representation prejudiced her defense. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the same time, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. In *Strickland*, the Supreme Court considered a similar claim as the one here. Defendant claimed ineffective assistance of counsel because counsel did not seek more character or psychological evidence than was already before the trial court. The Court rejected Defendant's claim because it found that "counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on [Defendant's] acceptance of responsibility for his crimes." *Id.* at 699. The Court held that trial counsel could reasonably surmise from his conversations with Defendant that character and psychological evidence would be of little help. *Id.*

"Restricting testimony on [Defendant's] character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and [Defendant's] criminal history, which counsel had successfully moved to exclude, would not come in." *Id.* As a result, the Court concluded that trial counsel's defense was the result of reasonable professional judgment.

In the present case, it would be reasonable for counsel not to contact Doctors McCoy and Hawkins if it was not necessary to contact them or the decision not to do so was the result of a strategic choice. There is, however, no evidence in the record to show that it was either unnecessary for counsel to contact these health care professionals or that counsel made a strategic choice not to do so.

Doctor McCoy advised Defendant to spend some time in the family store because of his concern about Defendant's suicidal ideation. *See* Transcript of April 29, 2004 proceedings at 26. Since Defendant was charged because of her alleged work

in the family store, it would seem necessary for counsel to have contacted Doctor McCoy to understand the basis for his advice to Defendant. Similarly, nothing in the record suggests that it was not necessary for counsel to contact Doctor Hawkins after he knew that Defendant was being treated by Doctor Hawkins for a mental health condition. On the contrary, it appears that counsel did not pay attention to the implication of his client being treated by a psychologist for a mental health condition. By the time of the underlying plea[3] proceedings in this case, Defendant's condition had progressed beyond mere physical illness and pain to psychological and mental problems.[4] Had

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[3]Although Defendant provided information to counsel that she was being treated by Doctor Hawkins for a mental health condition, counsel did not seek toknow more about Defendant's mental health status from Defendant. On direct examination during the § 2255 evidentiary hearing, counsel, Blasdel, stated that he did not feel that Defendant's pain management could affect Defendant's competence even after he knew that Defendant was being treated for a mental health condition. Transcript at 51. This suggests that Blasdel's failure to contact Doctor Hawkins did not result from due consideration of the importance of this fact.

[4]The majority opinion misses this point and concentrates on counsel's initial conduct in reviewing the medical evidence from some of Defendant's doctors. The opinion fails to articulate why counsel's knowledge that Defendant was being treated for a mental health condition

counsel contacted Doctor McCoy or Doctor Hawkins he would have discovered this fact casting doubt on Defendant's competency to enter into a plea.

In addition, counsel's failure to contact these health care professionals did not result from a strategic choice. Nothing suggests that evidence from Doctor McCoy or Doctor Hawkins could have been harmful to Defendant's underlying case. Indeed, as mentioned above, counsel did not know the evidence they had and whether the evidence could have assisted or prejudiced Defendant's case. Moreover, neither Defendant nor her relatives suggested to counsel that it was unnecessary to contact these health care professionals.[5] In short, despite his knowledge of these medical

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at the time of the plea proceedings should not have raised counsel's curiosity and interest to investigate Defendant's mental health status.

[5]Counsel's conduct may be reasonably influenced by the actions or statements of a client. In *Strickland*, the Supreme Court noted:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information

professionals, counsel unreasonably failed to contact them.

The majority concludes that Defendant did not receive ineffective assistance of counsel because counsel's performance

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> supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland at 691 (internal citations omitted). In the present case, nothing suggests that Defendant led counsel to believe that it was unnecessary to contact Doctor McCoy or Doctor Hawkins. Nor is there any evidence to suggest that Defendant gave counsel reason to believe that it would be fruitless to contact the doctors or that information from them would be detrimental to her case. The majority asserts that counsel thoroughly investigated Defendant's case. However, this is not supported by the record. Although counsel reviewed the records of some of Defendant's physicians, he did not contact Doctors McCoy and Hawkins who were at the time treating Defendant for both pain and mental health problems. More importantly, his omission of contact with Doctor McCoy ignored the fact that Doctor McCoy was the doctor that advised Defendant to spend some time in the family store, the reason for which she was charged. An assertion of thoroughness should require review of the records from Doctors McCoy and Hawkins since counsel knew about them.

did not fall below an objective standard of reasonableness. However, the majority provides no explanation why counsel's duty to investigate in this case was unnecessary or the result of a strategic choice. Instead, the majority asserts that Defendant failed to apprise counsel of the details of her mental status, notwithstanding that counsel was aware that Defendant was being treated for a mental health condition. According to the majority:

> Blasdel encountered a client who was well educated and demonstrated no difficulty in communicating with him about the case or the decision to plead guilty. He met with her, her husband, and her son numerous times and clearly explained the process of entering a guilty plea and the details of the plea agreement. At no point did anyone, including Philipose's doctors or her chiropractor son, express to Blasdel a concern over Philipose's competence.

See Order and Judgment at 11. The majority therefore implies that a Defendant has the duty to inform counsel of the details of Defendant's mental status, even though such information could easily be gathered from Defendant's mental health professional.

In view of the fact that counsel here was aware that Defendant was being treated for a mental health condition, the "education" or the ability of Defendant to "communicate" should not be relevant to counsel's decision to investigate Defendant's mental status. In many cases of incompetency, Defendant will be well educated and can communicate and that fact should not obviate counsel's duty to investigate, especially after counsel knows that his client is being treated for a mental health condition. A criminal defense lawyer should know that when a client is being treated for a mental health condition, the client may not be the source of authority for the client's condition or basis of treatment.

Similarly, the failure of Defendant's son and doctors to express concern about Defendant's competency should not be of any significance in this case. Counsel knew here that Defendant was being treated for a mental health condition. A Defendant provides the names of her treating physicians and mental health professionals to a lawyer so that the lawyer can

evaluate the information from the professionals and make the judgment on case strategy. As *Strickland* makes clear, counsel has the duty to investigate. *Strickland* at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Defendant's doctors have no such duty and indeed may not provide any information to counsel or the court, without the permission of the client, in light of the physician-patient privilege.

Even though counsel knew that Defendant was being treated for a mental health condition, he failed to contact Defendant's treating mental health professional before advising Defendant to enter into a plea. Counsel did not carefully evaluate the importance of the fact that Defendant was receiving mental health treatment. It was not unnecessary for counsel to contact Doctor Hawkins and counsel should not have relied on his untrained, non-medical judgment to conclude that Defendant's pain management could not affect her competency.

Counsel's failure to investigate Defendant's mental health status did not result from a strategic choice or out of consideration that evidence from Doctor Hawkins would be harmful to Defendant's case. Accordingly, it was unreasonable for counsel not to investigate Defendant's mental health status before conferring with her on the advisability of entering into a plea.

During the evidentiary hearing, Doctor McCoy and Doctor Hawkins presented the picture of a disturbed, traumatized and incompetent patient who could not reasonably evaluate the consequences of entering into a plea. Doctor Hawkins testified that Defendant suffered from post traumatic stress disorder. *See* Transcript of April 29, 2004 proceedings at 5. According to Doctor Hawkins, this made Defendant indifferent about life, *Id.* at 6, and disinterested in the consequences of things. *Id.* at 7. Doctor Hawkins testified that Defendant was self-destructive. *Id.* at 10. He testified that Defendant was suicidal. *Id.* He testified that Defendant was on

Demerol periodically, even though she could not use it consistently due to tolerance problems with the medication. Doctor Hawkins testified that he would be skeptical of Defendant having made a knowing, voluntary and rational decision to enter a plea of guilty in this case. *Id* at 11.

Doctor McCoy testified that Defendant's ability to make a rational decision and understand the consequences of that decision were greatly impaired. *Id.* at 23. Doctor McCoy described Defendant as living with an unrelenting, nagging at times very severe overwhelming pain on one hand and with medication which caused extreme nausea and intractable vomiting on the other. *Id.* at 23-24. Doctor McCoy stated that he was concerned about the Defendant's suicidal ideation, and that he did not remember another patient in his practice over the course of seven years with whom he was as concerned. *Id.* at 25. Doctor McCoy testified that the short acting narcotics the Defendant was prescribed would impair or affect in a negative manner the cognitive function of the Defendant. *Id.* at 31.

The conclusions of these professionals about Defendant's mental and physical health at the time she entered into the plea were neither refuted nor challenged by the Government. Therefore, Defendant lacked the competency to enter into the plea based on the opinion of the doctors.

As the Supreme Court has stated, in order to prove that a counsel's action or omission were prejudicial to a Defendant's case, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. Here, had counsel contacted Doctor Hawkins before Defendant entered into the plea, he would have likely questioned Defendant's competency to enter into the plea. Had counsel contacted Doctor McCoy, he would have more properly understood why Defendant was in the store and even known that Doctor McCoy considered Defendant's presence in the

store therapeutic. Thus, there is a reasonable[6] probability that the outcome would have been different in this case both on the merits of the charge and Defendant's competency to enter into the plea.

Accordingly, I would vacate the district court's judgment and remand. Upon remand, I would direct that the district court set aside Defendant's plea of guilty and her sentence and I would direct that the district court determine Defendant's present competency. If Defendant is then found to be presently competent, the Government may consider whether further proceedings against the Defendant should be undertaken or whether the criminal proceedings should be dismissed.

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[6]During the evidentiary hearing, Doctor McCoy testified that he thought Defendant being in the store, and even greeting customers, could be therapeutic. Transcript at 32.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 04-6240

MARIAMMA J. PHILIPOSE,

Defendant-Appellant

ORDER

Filed February 22, 2006

Before HENRY, HOLLOWAY and LUCERO, Circuit Judges

Appellant's petition for rehearing is denied by the panel that rendered the decision. Judge Holloway voted to grant rehearing.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular service as required by Fed. R. App. P. 35. No member of the panel and no

judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is denied.

Entered for the Court
CLERK, COURT OF APPEALS

by: S/ Opal A. Carter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	NO. CR-02-124-T
	)	NO. CIV–04-104-T
MARIAMMA J. PHILIPOSE,	)	
Defendant.	)	

ORDER

Pursuant to 28 U.S.C. § 2255, defendant has filed a motion [Doc. No. 18] to vacate, set aside or correct the sentence imposed in this action following defendant's entry of a guilty plea. In response, the government filed a motion [Doc. No. 25] for "summary dismissal" of the § 2255 motion, contending that it is barred by the terms of the plea agreement executed by

defendant. On April 29, 2004, the court held an evidentiary hearing on defendant's motion and took the matters under advisement. For the reasons set forth herein, the court, having considered the evidence and the record in this case as well as the governing law, finds that the government's motion for summary dismissal should be denied and that the defendant's § 2255 motion should also be denied.

Defendant was charged by information with making false statements to obtain Federal Workers' Compensation benefits. On July 27, 2002, she entered a plea of guilty to a single misdemeanor count of making a false statement to obtain the benefits. The plea was entered pursuant to a written plea agreement in which defendant agreed to waiver her right to appeal and to file post-conviction motions collaterally attacking her conviction or sentence. The court concluded at the change of plea hearing that defendant was knowingly and voluntarily changing her plea, and accepted her plea. Throughout the proceedings, defendant was represented by Mark Blasdel,

whom she had retained.

On February 3, 2003 defendant was sentenced to two years probation with a term of home confinement not to exceed 180 days, restitution in the amount of $31,189.82, and a $25.00 special assessment. Defendant did not file a direct appeal of the conviction and sentence. However, on January 30, 2004 she filed this motion to vacate, modify or set aside her sentence. The primary basis for her motion is the contention that her Sixth Amendment right to counsel was violated because she received ineffective assistance of counsel in connection with the entry of a plea of guilty and the negotiation of the plea agreement. That argument is based on her contention that counsel failed to adequately investigate defendant's mental state and failed to adequately investigate her mental capacity to enter a plea agreement and understand its ramifications. She also contends that counsel recommended defendant enter a guilty plea despite the fact that the plea agreement offered her no benefit and that he failed to conduct a meaningful investigation of the case prior

to recommending that she enter a guilty plea. Defendant alleges that she lacked the mental capacity to enter into the plea agreement because she was suffering from intense pain or was taking pain medication and was under the care of a physician and a psychologist at the time.

The government initially argued that the motion should be summarily dismissed because the plea agreement contains an express waiver of the right to appeal or to collaterally attack the plea. As the government points out in its brief, the waiver provisions of plea agreements are valid and enforceable in this circuit. *See, e.g.,* United States v. Cockerham, 237 F.3d 1179, 1183 (10th Cir. 2001). According to the court, a "waiver of collateral attack rights brought under § 2255 is generally enforceable where the waiver is expressly stated in the plea agreement and where both the plea and the waiver were knowingly and voluntarily made." *Id.* However, the court in Cockerham also held that an exception to that general rule exists if the § 2255 motion claims ineffective assistance of

counsel in connection with the negotiation of the plea agreement. According to the court, "a claim of ineffective assistance of counsel in connection with the negotiation of a [plea] agreement cannot be barred by the agreement itself." 237 F.3d at 1184, *citing* Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999). Thus, the court concluded that "a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver." 237 F.3d at 1188.

In this case, defendant's ineffective assistance of counsel claim is expressly directed at the validity of the plea agreement itself, as defendant contends that counsel did not adequately consider or investigate her mental capacity at the time the agreement was being negotiated and finalized. Accordingly, the waiver provisions of the agreement do not bar her claim, and the government's motion [Doc. No. 25] for summary dismissal of her § 2255 motion on that basis is

DENIED.

That conclusion does not, of course, end the court's inquiry because, to prevail on her motion, defendant must show that counsel's assistance was constitutionally defective and that her mental capacity was so impaired that she was unable to knowingly and voluntarily enter a plea of guilty and waive her right to trial. At the April 29, 2004 hearing on defendant's § 2255 motion, defendant's evidence to support her motion consisted of the testimony of a psychologist and medical doctor who treated defendant during the relevant time period. In addition, the government presented the testimony of defendant's trial counsel.

Gene Hawkins, Ph.D., testified that defendant was his patient during the time period of approximately February, 2002 through April, 2003. Dr. Hawkins testified that he specializes in pain management, and defendant was referred to him by her medical doctor because of her severe back pain. According to Dr. Hawkins, defendant injured her back in 1981 while she was

employed as a nurse at the Veterans' Hospital; although she had five surgeries from 1981 through 1991, her pain did not diminish. That was complicated by the fact that she had an intolerance to pain medication; as a result, he believed that she was suffering from a form of post-traumatic stress disorder, resulting in a feeling of helplessness and alienation. Dr. Hawkins was also concerned that defendant was suicidal during this time period, and she did not care what happened to her. When asked if defendant was able to think rationally during the time period of July 2002, Dr. Hawkins testified that she had become disinterested in the consequences of events. He further stated that he would have questioned her ability to enter a knowing and voluntary plea.

On cross-examination, Dr. Hawkins testified that he was aware that defendant was involved in a federal court criminal proceeding during the time he was treating her. He knew she was represented by an attorney. Despite his concerns about defendant, Dr. Hawkins did not attempt to contact her attorney

or anyone connected to this federal criminal matter and did not communicate his concerns to anyone other than her family. He did not, however, caution defendant or her family that she should not engage in plea negotiations; he was focused on her treatment. Dr. Hawkins also testified that defendant's attorney did not contact him.

During the time period in which he was treating defendant, Dr. Hawkins testified, the pain medication she had taken was reduced. Specifically, she no longer took Demerol, and was "not consistently" on pain medication, according to Dr. Hawkins. Dr. Hawkins has not seen defendant as a patient since April, 2003.

The court also heard the testimony of Wade McCoy, M.D., a family practice physician in Bethany, Oklahoma, who treated defendant in 2002 and 2003; Dr. McCoy referred her to Dr. Hawkins for pain management. Dr. McCoy testified that defendant's back pain affected her daily living. Because she became extremely nauseous when taking pain medications, she

generally avoided medication. According to Dr. McCoy, defendant had tried to take a variety of pain medications, including morphine, Demerol, other narcotics, and some non-narcotic medications. Because she had nauseous reactions to all, he suggested transdermal patches; those treatments were also not tolerated by defendant. As a result, she had to deal with constant pain. Dr. McCoy testified that defendant and her husband owned retail businesses in Bethany and that he recommended she spend time in the stores as a way of distracting her from her pain. Otherwise, because her children are grown, she would be alone at home most of the time, and Dr. McCoy felt that she should be around other people. He testified that both he and defendant's family were concerned about her suicidal thoughts.

Dr. McCoy was aware of the federal criminal action against defendant, and he was treating defendant during the time period in which she executed the plea agreement and entered a guilty plea. He was not contacted by her attorney,

Mark Blasdel; Dr. McCoy also testified that he did not attempt to communicate with Mr. Blasdel or anyone else on defendant's behalf.

Mark Blasdel testified that he was retained by defendant to represent her in defending against charges that she falsely represented her inability to work to obtain Federal Workers' Compensation benefits. Mr. Blasdel testified that he has been practicing law for approximately 30 years, that he served as an assistant District Attorney for Oklahoma County for nine years and, since that time has been engaged in private practice. His primary area of practice is criminal defense, and he has represented many defendants since beginning private practice in 1983.

Prior to testifying at the April 29, 2004 hearing on defendant's § 2255 hearing concerning the details of his representation of defendant, Mr. Blasdel asked if defendant was willing to waive the attorney-client privilege with respect to his representation. After conferring with defendant, her current

counsel announced that she is willing to waive the attorney-client privilege with respect to Mr. Blasdel's representation of her and that she fully and completely understands what is meant by the privilege and the waiver. Mr. Blasdel then testified that defendant telephoned him to request that he represent her in defending against the pending criminal charges regarding her representations to the Federal Workers' Compensation authorities. He recalled that she was well-educated, having attended college in India, and that she had been employed as a nurse at the Veterans' Administration hospital. She had seriously injured her back while working at the hospital, and had been determined by Federal Workers' Compensation to be totally disabled. Mr. Blasdel also testified that defendant had no difficulty in communicating with him; although she had a slight accent, he had no difficulty understanding her, and he found her to be fully competent.

According to Mr. Blasdel, he also met with defendant's husband and her son, a chiropractor, on several occasions. He

learned that the family owned two businesses. Mr. Blasdel testified that he interviewed employees of the businesses, and they told him that defendant regularly visited the business locations but that she did not perform any work because she had severe back pain. Blasdel also obtained defendant's medical records reflecting her back injury, her unsuccessful surgeries, her consultations with several medical professionals, and her continuing attempts to obtain relief from pain.

Mr. Blasdel testified that he had many conversations with defendant, her husband and her son. There was no question in his mind that she had constant pain. He believed, based on the medical records and his communications with her doctors, that she was unable to work. Blasdel testified that there was also no question in his mind that defendant understood the criminal allegations against her and their severity.

Introduced as government's Exhibit 4 is a set of documents submitted by Mr. Blasdel to the U.S. Attorney's office on behalf of defendant in April, 2000. These consist of

six letters or reports from physicians and other medical provides who described the nature and extent of defendant's back injuries and opined that defendant was unable to work. Also included in these materials are affidavits from two employees of the businesses owned by defendant's family; both explain in detail that she had regularly visited the businesses but that she did not perform any work because her pain rendered her unable to do so.

These documents were submitted by Blasdel with a letter in which he expressed his interest in meeting with the U.S. Attorney's office and explaining defendant's medical status. Ultimately, he arranged a meeting, and he took an orthopedic specialist, Dr. Nathan Bradley, with him so that Dr. Bradley could explain the extent of defendant's back problems and resulting pain.

Mr. Blasdel testified that his initial efforts on defendant's behalf, including his communications with her medical providers and the employees of the family businesses,

were designed to gather evidence in an attempt to persuade the government not to pursue charges against her. At some point, however, he realized that the government fully intended to pursue the charges; however, the U.S. Attorney's office indicated a willingness to allow her to plead to a misdemeanor offense than the felony charges which were being considered.

According to Mr. Blasdel, a plea proposal was presented which would allow defendant to plead guilty to one count of making a false statement to the government, a misdemeanor charge. If defendant agreed to do so, the government would agree not to pursue felony charges against her. Mr. Blasdel testified that he had many discussions with defendant and her husband and son in which he explained that this proposal represented a significant reduction in the risk she would face if she were charged with felony counts and proceeded to trial. He also told them that he believed there was significant evidence supporting her medical problems and inability to work and that he believed a strong defense could be presented. According to

Mr. Blasdel, defendant never appeared to be under the influence of pain medication during any of his meetings with her. He believed she understood everything about the plea proposal and her waiver of the right to trial; she never indicated any lack of understanding. He also explained the proposal to her husband and her son, and attempted to inform defendant and her family to the best of his ability of all implications of the plea proposal and possible resulting sentence. He reviewed with defendant each question on the plea petition, asked if she understood, and was told that she did. Blasdel testified that defendant made the decision to sign the plea agreement.

Introduced as Government's Exhibit 1 is a copy of the plea petition executed by defendant on May 24, 2002. In response to Question No. 5, defendant correctly stated that she was under the care of a doctor at the time she executed the petition. Blasdel testified that he did not think that her condition or her treatment affected her ability to comprehend or think clearly. In response to question No. 41, defendant stated that she

was not then under the influence of any medication; Blasdel testified that defendant provided that answer and that he believed it to be true. He understood that she had an intolerance and dislike for pain medication and that, as a result, she endured pain. At no time, however, did her pain appear to affect her competency. He recalled that she had a high degree of anxiety about the charges against her and the prospect of a trial, but he did not believe at any time that she was incompetent.

Government Exhibit 2 is a copy of the plea agreement executed by defendant, Mr. Blasdel as her attorney, and Arlene Joplin and Ross N. Lillard III as assistant United States Attorneys on May 28, 2002. Again, Blasdel testified that he reviewed the proposed plea agreement with defendant prior to the time she executed it. Specifically, he discussed with her the waiver provisions and their meaning. According to Blasdel, he also gave her a copy and asked her to read it again and let him know of any questions. He did not recall that she had any questions.

The court has again reviewed the plea petition executed by defendant and plea agreement executed by the parties as well as the transcript of the July 27, 2002 hearing at which defendant changed her plea and entered a guilty plea to a misdemeanor in accordance with the plea petition and plea agreement. The court has also reviewed the transcript of the February 2, 2003 sentencing proceeding. In the plea petition, defendant expressed her understanding and knowledge of the rights she was waiving.

During the July 27, 2002 hearing on defendant's petition to enter a guilty plea, the court repeatedly asked defendant if she understood her rights, if she was voluntarily waiving those rights, and if she understood and agreed to the provisions of the plea petition and agreement. Defendant repeatedly responded affirmatively, and at no time did the undersigned have reason to question her competency or the voluntariness of her actions. Neither her demeanor nor her testimony gave the court reason to doubt her ability to enter into a knowing and voluntary

agreement.

During the July 27, 2002 hearing on defendant's change of plea, defendant's counsel asked the court if she could remain seated because of her back pain, and the court agreed. However, there was no suggestion that her discomfort affected her capacity to understand and agree to the specifics of the plea petition she executed or to the provisions of the plea agreement executed by defendant and the government. Having seen no evidence that she lacked the competency to execute the plea petition or the plea agreement, and having heard her responses under oath, the court had no reason to doubt defendant's competency to enter a plea of guilty. Accordingly, the court accepted that plea at the July 27, 2002 hearing.

Similarly, the court had no reason to doubt defendant's competency during the February 3, 2003 sentencing proceeding. Furthermore, during the approximate six-month period from the July 27, 2002 change of plea hearing to the February 3, 2003 sentencing, there is no record of any communication from any

physician or psychologist regarding defendant's mental capacity. Neither is there is any record of any communication by defendant or her family in that regard.

Blasdel also testified that, during this six-month period, defendant did not discuss with him the possibility of withdrawing the guilty plea, and no one contacted him to express reservations about her competency. At the February 3, 2003 sentencing, the court was not advised of any concerns about defendant's competency and, based on defendant's statements under oath and her demeanor, had no reason to question her competency.

Blasdel testified that defendant did not express to him a desire to withdraw her guilty plea; however, after defendant was sentenced, he learned that she had approached another attorney about withdrawing the plea of guilty. However, he did not believe that she pursued that action, as he heard nothing more until he was advised of the filing of her § 2255 motion based on the contention that his representation was ineffective.

To prove that Mr. Blasdel rendered ineffective assistance of counsel, defendant must establish both that counsel's representation fell below an objective standard of reasonableness and the deficiency prejudiced her defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Defendant must also overcome the strong presumption that counsel's decisions "might be considered sound trial strategy." Id. at 689. Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Romano v. Gibson, 278 F.3d 1145, 1151 (10th Cir.2002), quoting Strickland, 466 U.S. at 689.

At the April 29, 2004 evidentiary hearing on defendant's § 2255 motion, defendant did not offer any evidence to refute Mr. Blasdel's testimony with regard to the facts concerning his representation of defendant in connection with the criminal

charges, the investigation of same, the government proposal regarding a plea agreement, the plea petition or agreement, and defendant's decision to enter a guilty plea. She did not testify in her own behalf at the hearing on her § 2255 motion, and she offered no witnesses other than the medical professionals. As a result, there is no evidence in the record to contradict Mr. Blasdel's testimony regarding his representation of defendant.

Having reviewed the testimony and the record in this case, the court concludes that defendant's ineffective assistance claim must fail. The record reflects that Mr. Blasdel worked diligently to investigate the facts and to provide medical and other evidence in defense of defendant. Furthermore, he arranged a meeting with an orthopedic physician and the U.S. Attorney's office to present the facts regarding defendant's back injury and inability to perform work. The record also reflects that he communicated not only with defendant but with her husband and her son, who is a chiropractor. At no time did defendant, her husband or her son express to Mr. Blasdel any

reservation whatsoever regarding defendant's competency or ability to understand the charges she faced. Significantly, defendant and her husband and son expressed no reservations about defendant's mental competency and ability to understand and agree to the plea petition, the terms of the plea agreement, or the effect of her decision to enter a plea of guilty.

The evidence does not support defendant's claim that Mr. Blasdel should have contacted Dr. McCoy and Dr. Hawkins prior to discussing the plea agreement with defendant. There is no evidence that defendant, her husband, or her son suggested that her pain level affected her ability to think rationally or her competency to make decisions. Although both doctors knew about the federal charges, neither suggested to defendant or her family that she was not competent to proceed; neither contacted her attorney or anyone else to suggest reservations about her ability to make decisions.

Both Dr.McCoy and Dr. Hawkins testified that they were treating defendant during the time she entered the plea of guilty

PAGE 23 WAS NOT PROVIDED BY THE PETITIONER FOR THE SUPREME COURT AS OF THIS PUBLICATION DATE.

motion for summary dismissal [Doc. No. 25] is also DENIED.

IT IS SO ORDERED this 11th day of May, 2004.

S/Ralph G. Thompson
UNITED STATES DISTRICT JUDGE